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IN THE

Supreme Court of the United States

October Term, 1962

No. 304

ELLIOTT KAHANER,

Petitioner,

—v—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER, ELLIOTT KAHANER

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REPLY BRIEF FOR PETITIONER, ELLIOTT KAHANER*

I. Introductory: The Factual and Legal Setting of the "Corroboration" Issue.

This reply is confined to the following contention at page 20 of the Government's Brief in Opposition:

> "While it is true that the basic thread of the conspiracy is supplied by accomplices, there are many

* Petitioner owes the Court an explanation for the unusual length of this Reply Brief and for its being filed so near the end of the Court's Summer recess. The Reply Brief aims at an informative treatment of the principal Federal cases on the issue of the need for corroboration of accomplice testimony and of the State cases on the issue of the standard or adequacy of such corroboration. The research for these purposes has had to be done from the cumbersome "Key Number Digest" sources, in the absence of prior systematic treatment of these subjects. This has taken time, and presentation of the results herein takes considerable space in printed pages.

> points of corroboration. The telephone logs, the marked papers on the restitution plan, Judge Keogh's cards, the testimony of secretaries, and of the nonaccomplice lawyers, Becker, Jaspan and Williams, all bolster the narrative of the government's principal witnesses."

Insofar as the above contention of the Government is addressed to the case of petitioner Kahaner, we take it that the contention is aimed at Kahaner's argument in his Petition for Certiorari herein (pp. 33-34) that his conviction was based solely on the uncorroborated testimony of accomplices, and that this Court should re-examine and modify the Federal rule that accomplice testimony does not require corroboration.

The Government's intimation in the above quoted statement that the accomplice testimony against Kahaner was corroborated, makes it pertinent to mention, to begin with, that both of the Courts below viewed the conviction as resting dispositively if not exclusively on the accomplice testimony. Thus, as we noted in Kahaner's Petition for Certiorari, the opinion of the Court of Appeals remarked that the Government's case "was based mainly on the testimony of Erdman and Moore—concededly interested witnesses * * * *" (Appendix to Kahaner's Petition, p. 4a). We are now to note also that the Trial Court instructed the jury that "indeed, if you do not believe these witnesses [the accomplice witnesses], particularly Erdman and Moore, I would say you should acquit the defendants, since the structure of the Government's case in large measure rests upon their testimony" (II. 387a).*

* We adopt in this reply brief the Government's method of referring to the several printed appendices herein. See the Government's Brief in Opposition herein, at page 2, footnote 1.

It is true that the Trial Court also instructed the jury as follows:

> "To establish the proof of the conspiracy and the participation therein by the individual defendants, the Government relies, in the main, upon the testimony of Erdman and Moore. It also offers the testimony of other co-conspirators, and that of independent witnesses to corroborate, in some instances, Erdman's and Moore's testimony. It also relies upon documentary evidence." (II. 357a).

On the other hand, the Trial Court also instructed the jury as follows:

> "* * * if you should find that no cash payment was made to Keogh or Kahaner—as Erdman and Moore testified was made—then on the evidence here presented, there would be no basis for a finding of corrupt endeavor.
>
> All counsel agree that the central and basic issue in the case is whether the money was paid over to Keogh or Kahaner * * *." (II. 383a).

Our reason for quoting this last item from the instructions to the * * * will become apparent *infra*, where we expect to show that, if a requirement of corroboration should be applied here, the corroboration would have to relate to the essential element of the paying over of the money.

Before setting forth the authorities for the proposition that corroboration should be required and that the supposed "points of corroboration" mentioned by the Government are insufficient under the standards followed in the jurisdictions which do require corroboration, let us first examine

briefly these "points of corroboration" referred to by the Government insofar as they may affect petitioner Kahaner's situation:

The first such "point" mentioned by the Government is "the telephone logs". Insofar as there was testimony about telephone logs affecting Kahaner, it consisted only of the following items: (1) Kahaner's telephone message book showed a telephone call or calls from the accomplice witness Erdman; (2) Kahaner's telephone message book also showed a call from defendant Keogh setting up a luncheon appointment for April 5, 1961. Kahaner admittedly knew Erdman well, and was a medical patient of his, so that a bare showing of a telephone call from Erdman is "corroborative" of nothing (E.g., II. 263a). As to the April 5 luncheon, Kahaner readily admitted that this luncheon took place, as did Keogh also, both of them saying that the problem of the criminal proceedings in the bankruptcy case was not discussed at the luncheon (II. 281a 282a, 316a).

The Government's second suggested "point of corroboration" consists of "the marked papers on the restitution plan". This refers to nothing more than the overall picture of the existence of a restitution plan, which Kahaner concedes. However, the disinterested attorney Becker and Jaspan testified that Kahaner at a meeting opposed the plan to reduce the jail sentences in consideration of the financial restitution (II. 219a-222a, 239a-240a); and the testimony is uncontradicted that Kahaner's very presence at the latter meeting was virtually the result of a command from Judge Rayfiel, the regular Assistant United States Attorney assigned to the case (Williams) being unavailable (II. 237a 239a).

The Government's third "point of corroboration" is "Judge Keogh's cards". This does not affect petitioner Kahaner.

The Government's next "point of corroboration" is "the testimony of secretaries". This consisted of the testimony of Rose St. George, which was not "corroborative" of any element of the offense charged, and the testimony of Rose Kippe which likewise was not "corroborative". Miss St. George testified that Kahaner was at an office party on April 3, 1961 from 4 P.M. until past 5:30 P.M., when Kahaner was supposed to have been meeting with the alleged conspirators and demanding additional money (contrast II. 242a-243a with II. 114a, 44a-45a). Miss Kippe identified Kahaner's diary entry of the morning of March 29, 1961, and she gave direct testimony, which confirmed Kahaner's claim that he had been at a meeting with Judge Frank, at a time when he is supposed to have been guiltily meeting with the co-conspirators (contrast II. 307a-309a with II. 40a-41a, 109a-110a). Judge Frank's testimony, as a Government witness, substantially supported Kahaner's claim in this respect (II. 318a-320a).

The Government's final "point of corroboration" is "the testimony * * * of the non-accomplice lawyers, Becker, Jaspan and Williams". Mr. Jaspan's testimony related solely to the restitution phase, which we have treated above. Mr. Becker, who was the original attorney for the bankruptcy prosecution defendants, did not "corroboratingly" inculpate Kahaner in any way. Becker's testimony had to do with (1) the early discussions as to non-indictment of some of the bankruptcy case defendants, (2) the alleged arrangements for a guilty plea, and (3) the restitution plan. The restitution feature has been discussed above. The early

arrangements for non-indictment of some of the defendants are fully explained at pages 6-8 of the Kahaner Petition for Certiorari herein. The matter of the guilty plea, insofar as this involves the testimony of Becker, is to the effect that Becker was of the belief that his clients were going to plead not guilty, whereas Kahaner had stated that the clients were going to plead guilty (III. 116, 117). Kahaner testified that Erdman had told him, while Kahaner was in Erdman's office for surgery, of the bankruptcy defendants' intention to plead guilty (II. 262a). As to the Government's reference to the "corroborative" testimony of Assistant United States Attorney Williams, this relates to (1) the arrangements for non-indictment of some of the bankruptcy defendants, (2) Kahaner's announcement to Williams that there would be a guilty plea, (3) the question of the Government's opposition to withdrawal of the guilty plea, and (4) the question of who would argue the Government's case on appeal. The first of the above mentioned items, as to the non-indictment of some of the defendants, has been treated above. Likewise as to the second of those items, regarding the proposed guilty plea. The item as to withdrawal of the guilty pleas is "corroborative" of nothing because Williams testified that he had opposed the withdrawal and that this had occurred with the approval of Kahaner (II. 184a). The item as to the arguing of the Government's appeal in connection with withdrawal of the guilty pleas relates to testimony by the accomplices Moore and Erdman that Kahaner had said that he was going to argue the appeal (IV. 84). However, Williams' supposed "corroboration" of this was, actually, to the effect that it was the custom for the United States Attorney himself to argue all appeals, and that Kahaner (then recently named Acting United States Attorney) had said he might want

to argue the appeal in question, at which Williams said "he was not surprised" and that "there was nothing unusual about that". Thereafter Kahaner instructed Williams himself to argue the appeal, which was done. See II. 182a-184a.

Under our heading "III", *infra*, we take up the authorities which show that in jurisdictions applying the requirement of corroboration of accomplice testimony, the above supposed "points of corroboration" cited by the Government herein as against Kahaner would be utterly insufficient to satisfy the standards of such "corroboration". Before asking this Court to consider these last mentioned authorities, we shall undertake to show that such requirement of corroboration should be applied in the instant case.

II. The Federal Rule as to Corroboration of Accomplice Testimony.

As we pointed out in our Petition for Certiorari herein (p. 33), the only explicit declaration which has ever been made by this Court on the question of whether corroboration of accomplice testimony is *required* in Federal criminal trials, is merely the statement that no absolute requirement of such corroboration exists. *Caminetti* v. *United States*, 242 U. S. 470, 495-496. The *Caminetti* case was decided by this Court on January 15, 1917. At the same Term of this Court, on June 11, 1917, the Court decided *Valdez* v. *United States*, 244 U. S. 432, affirming a conviction for murder committed in the then territory of the Philippine Islands. So far as appears from the report of this Court's decision in *Valdez*, and from the description of the arguments and briefs of counsel in the Lawyers Edition Report

(61 L. Ed., pp. 1242 *et seq.*), the case did not involve any statutory or constitutional provision applicable to the Philippines Territory which would have required corroboration of accomplice testimony. It is therefore of considerable interest that the Court in *Valdez* expressly undertook to examine whether there had been corroboration of the accomplice testimony in that case (244 U. S. at 440-442). Both the majority and minority opinions in *Valdez* make it rather plain that the probable reason why the Court felt called upon to look into the question of corroboration was that the accused (Valdez) was a person of the highest cultural and social background, whereas the accusing accomplice was a person of conspicuously corrupt character. These circumstances in the *Valdez* case which seemingly led the Court to attach importance to the question of corroboration of accomplice testimony within barely six months after the Court's qualified negation of the requirement of such corroboration in the *Caminetti* case, persuasively suggests that the Court never intended, by the *Caminetti* decision, to rule out the necessity for considering the sufficiency of corroborating evidence on an unvarying and unqualified basis in Federal criminal proceedings, but that at least in cases where there is presented a striking disparity between the respective character backgrounds of the accused and the accomplice, considerations of justice would favor that a Federal court should undertake such inquiry into the sufficiency of the corroboration. We respectfully submit that the instant case, involving a former high Federal prosecutive official of unblemished background and brilliantly promising career prospects, and a former State Judge of distinguished prior reputation, calls for the closest scrutiny of the sufficiency of the allegedly corroborative

evidence which the Government adduced in ostensible support of the testimony of accomplices who in this instance happen to be also persons of base character as shown either by their prior histories or by their performance in the instant trial.

For a comprehensive collection of the older American authorities—preceding the *Caminetti* case—which required corroboration of accomplice testimony, see the Reporter's notes of the argument of counsel in 61 L. Ed. at pp. 444-445.

An additional persuasive indication that this Court's enunciation in the *Caminetti* case, *supra*, of the principle that corroboration of accomplice testimony is not an absolute requirement in Federal criminal trials was not intended to mean that the failure to require such corroboration would never be error, is found in *Holmgren* v. *United States*, 217 U. S. 509, decided in 1910 by the unanimous Court and never thereafter criticized, disparaged or departed from in any other decision of this Court (including *Caminetti*). In *Holmgren* the Court said that "It is undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, *and to require corroborating testimony before giving credence to them*" (pp. 523-524). (Emphasis supplied.)

In *Caminetti* this Court referred to *Holmgren*, stating that in the latter case "* * * this Court refused to reverse a judgment for failure to give an instruction of this general character [i.e., that accomplice testimony must be corroborated] while saying that it was the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to such evidence" (242

U. S. at 495). The Court immediately then went on to say, in *Caminetti*, that "while this is so, there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them" (*ibid*). Thus the Court in *Caminetti* appears to have fully preserved in force the "better practice" standards laid down in *Holmgren*.

Also, nearly three years after *Holmgren*, this Court in *Bennett* v. *United States*, 227 U. S. 333, 339 (decided February 24, 1913), although not referring to *Holmgren*, had treated an issue of corroboration of accomplice testimony on the basis of the apparent assumption that such corroboration might properly be required.

The earliest decision in the lower Federal courts which noticed the *Holmgren* ruling was *Richardson* v. *United States*, 181 Fed. 1, 9 (C.C.A. 3 1910), where the *Holmgren* case was cited only for the following proposition:

> "No doubt there is a well established practice, sanctioned by long practice and judicial approbation to caution juries about accepting the evidence of an accomplice without material corroboration, coming, as it does, from a polluted source. But this is as far as the matter goes."

Thus, within a few months after this Court's decision in *Holmgren*, and several years before *Caminetti*, there had commenced in the lower Federal courts that emasculative interpretation of the *Holmgren* language which was eventually to become virtual gospel in Federal criminal trials, namely, that there is *never* any need for a court to insist upon corroboration of accomplice testimony and the most that is needed is a cautionary instruction to the jury.

Similarly, the frequently cited case of *Pina* v. *United States*, 165 F. 2d 890, 892-893 (C.C.A. 9 1948), often referred to in the decisions of the lower Federal courts which say that corroboration of accomplice testimony is not required in Federal criminal proceedings, deals only with the question of the cautionary instruction as to the weight to be attached to accomplice testimony. See also Mr. Justice Jackson, concurring, in *Krulewitch* v. *United States*, 336 U. S. 440, 454: "* * * in Federal practice there is no rule preventing conviction on uncorroborated testimony of accomplices, as there are in many jurisdictions, and the most comfort a defendant can expect is that the Court can be induced to follow 'the better practice' and caution the jury against 'too much reliance on the testimony of accomplices' ". Here again, we see, how, almost *sub silentio* as it were, the "better practice" which in the *Holmgren* case was stated to include both the general cautionary instruction and the requirement of corroboration, has reductively evolved into a "better practice" requirement only as to the cautionary instruction. Similarly, *Phelps* v. *United States*, 252 F. 2d 49, 52 (C.A. 5 1958), cites the *Holmgren* case only for the portion of the statement therein regarding accomplice testimony which states that the jury should be cautioned against placing too much reliance upon the testimony of an accomplice. And see *Lyles* v. *United States*, 249 F. 2d 744, 745 (C.A. 5 1957), treating the *Holmgren* rule as "dictum". Even more reductive—indeed obliterative—is *Doherty* v. *United States*, 230 F. 2d 605 (C.A. 9 1956), holding, on the basis of *Caminetti* and even of *Holmgren* itself, that "corroboration is not essential". Again, in *Cowell* v. *United States*, 259 F. 2d 660, 661 (C.A. 9 1958), the Court

took it upon itself—unwarrantedly, we submit—to observe that in the *Caminetti* case this Court treated the rule of the *Holmgren* case, *supra*, as "mere dicta". The Court in *Cowell* expressly rejected appellant's request, based on the *Holmgren* case, that the Federal rule be stated as one requiring corroboration of accomplice testimony. See also *Mimms* v. *United States*, 254 F. 2d 654, 655-658 (C.A. 9 1958), construing *Caminetti* as having in some sense overborne *Holmgren*. In *Audett* v. *United States*, 265 F. 2d 837, 846-848 (C.A. 1959), involving primarily an objection that the trial court had not given the familiar cautionary instruction in regard to accomplice testimony, and secondarily a request by appellant's counsel for adoption of the rule that conviction cannot be had on the uncorroborated testimony of an accomplice, the Court stated that any change of the rule should be made by Congressional legislation or by the Supreme Court.

Let us now retrace our steps back to what we may term the "pro-*Holmgren*" cases of the early part of the century:

In the second of the cases in the lower Federal courts wherein the *Holmgren* rule was noted, a case arising in 1913 in the Eighth Circuit (opinion by Sanborn, *C.J.*), the matter went quite differently from the way it had gone in the *Richardson* case in the 3rd Circuit in 1910, *supra*. We refer to *Sykes* v. *United States*, 204 Fed. 909, 913 (C.C.A. 8 1913), where the Court said:

> "It is only when the evidence is sufficient to convince of the guilt of the accused beyond a reasonable doubt that one may lawfully be convicted of a crime. 'It is undoubtedly the better practice,' says the Supreme Court, 'for courts to caution juries against too much reliance upon the testimony of

> accomplices, and to require corroborating testimony before giving credence to them.' Holmgren v. United States, 217 U. S. 509, 523, 524, 30 Sup. Ct. 588, 592 (54 L. Ed. 861, 19 Ann. Cas. 778). And the conclusion is that the uncorroborated testimony of the confessed perperator of a crime, contradicted under hope of immunity from punishment, which in this case has since turned to glad fruition, that another was an instigator or a participator in the perpetration of her crime, is not only insufficient to establish his guilt beyond a reasonable doubt, but that it presents no substantial evidence of it. Jahnke v. State, 68 Neb. 154, 104 N. W. 154, 158."

Moreover, in a ruling reminiscent of the "plain error" rulings of contemporary Federal criminal practice, the Court in *Sykes* rejected a contention by the Government that a point as to non-corroboration of the accomplice testimony had not been preserved by the defense through an express request for a peremptory instruction after the close of the evidence; the Court saying (204 Fed. at 913-914):

> "* * * But there is an exception to this general rule which has been made to prevent just such gross injustice as would result from the punishment of the defendant Sykes upon the evidence which has been recited. It is that in criminal cases, where the life, or as in this case the liberty, of the defendant is at stake, the courts of the United States, in the exercise of a sound discretion, may notice such a grave error as his conviction without evidence to support it, although the question it presents was not properly raised in the trial court by request, objection, exception, or assignment of error." (Citing authorities)

The Court concluded its opinion in the *Sykes* case with still a further ringing expression of its indignation at being asked to affirm a criminal conviction based on the uncorroborated testimony of an impeached accomplice witness (204 Fed. at 914):

> "The defendant in this case may not be lawfully deprived of his liberty for five years without proof of his guilt beyond a reasonable doubt, much less without any substantial evidence of it, and this court cannot disregard his appeal, sit in silence, and permit the perpetration of such an injustice."

The *Sykes* case was followed in *Fain v. United States*, 209 Fed. 525, 533 (C.C.A. 8 1913).

The next case in which the *Holmgren* rule was noticed was *Diggs v. United States*, 220 Fed. 545 (C.C.A. 9 1915). This is the case which later was decided by this Court under the name of the *Caminetti* case, *supra*. In *Diggs*, the Ninth Circuit said, "Notwithstanding the views expressed by the Supreme Court in the *Holmgren* case as to the better practice, that Court and the Federal courts generally have held that corroborating testimony is not necessary to support a conviction" (220 Fed. at 552). No decision of this Court was cited to support this last quoted statement.

The next decision in which the *Holmgren* rule was noticed was *Mark Yick Hee v. United States*, 223 Fed. 734 (C.C.A. 2 1915), where the Court apparently construed *Holmgren* as meaning only that "There is no common law rule which forbids a conviction upon the uncorroborated testimony of an accomplice whose evidence satisfies the jury beyond a reasonable doubt of the guilt of the accused" (p. 735).

In February 1917, about two weeks after this Court's decision in *Caminetti*, the Third Circuit again followed its ruling in the *Richardson* case, *supra*, which, as we view it, gave an emasculative meaning to the *Holmgren* rule. *Knoll* v. *United States*, 239 Fed. 16, 20-21 (C.C.A. 3 1917).

Of special interest as indicating how a conscientious Federal trial judge in the era immediately following the *Caminetti* decision was understanding this Court's declaration in the latter case, see *United States* v. *Murphy*, 253 Fed. 404, 406 (N.D. N.Y. 1918), where the Court, treating the *Holmgren* rule as being still controlling, and evidently referring to the *Caminetti* case and similar decisions of the lower Federal courts, said that those cases do "not hold, as contended for by counsel, that corroboration of an accomplice is not necessary, but they do hold that a conviction may be had without corroboration. A distinct difference. The principles enunciated in these decisions unquestionably apply to the testimony of an accomplice who has testified in a case and leaves the witness stand unimpeached. The Supreme Court, in such instances, as declared in the *Holmgren case*, *supra*, holds that a trial court should caution juries against too much reliance upon the testimony of an accomplice and to require corroborating testimony before giving credence to such evidence. . . ."

Again in 1919, two years after the *Caminetti* decision, the *Holmgren* rule was fully applied so as to bring about a reversal of a conviction *in the Second Circuit*. *McGinniss* v. *United States*, 256 Fed. 621, 626 (C.C.A. 2 1919). The Court said (p. 626):

> ". . . It is only when the evidence is sufficiently convincing of the guilt of the accused beyond a rea-

sonable doubt that one may lawfully be convicted of a crime, and, in a case such as this, the better practice was not to place reliance upon the testimony of this accomplice and to require corroborating testimony before giving credence to him. Holmgren v. U. S., 217 U. S. 509, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778. We feel required to say that the uncorroborated testimony of this perpetrator of a crime, confessed under oath, and not supported by other witnesses, with a possible hope of immunity from punishment, is not only insufficient to establish the guilt of the plaintiff's in error beyond a reasonable doubt, but that it presents no substantial evidence of it."

See also *Freed* v. *United States*, 266 Fed. 1012, 1014-1016 (D.C. App. 1920), where the Court referred to the fact that "for more than forty years in this jurisdiction it has been the practice to safeguard the interests of accused in prosecutions for serious offenses, where the testimony of accomplices has been admitted, by bringing directly to the attention of the jury the nature of such evidence, and the danger of convicting unless they should find supporting or corroborating evidence". The Court then went on to explain its view of the net combined effect of the *Holmgren* and *Caminetti* cases saying: "Certain it is that the Supreme Court has not ruled that the refusal of a trial court to grant a proper instruction, in a case where there is little, if any, evidence other than that of accomplices, is not so prejudicial to the accused as to warrant an appellate court in awarding him a new trial" (p. 1016).

In *Wagman* v. *United States*, 269 Fed. 568, 572 (C.C.A. 6 1920), the Court reiterated the *Holmgren* rule that "It would have been better practice to caution the jury against

relying too greatly upon the testimony of these accomplices, and to require corroborating testimony before giving it credence, * * *".

In *Morenkow* v. *United States*, 276 Fed. 293, 294 (C.C.A. 6 1921), the Court noted the *Holmgren* rule and that in the subject case the jury had been advised that it was "unsafe to convict a man under trial upon the uncorroborated testimony of an accomplice", the Court noting also that there had been such corroboration in the *Morenkow* case. To the same effect, see *Rudner* v. *United States*, 281 Fed. 516, 521 (C.C.A. 6 1922).

It is true that a little less than two years after the decision in *McGinniss*, *supra*, the same Second Circuit bench which had decided that case ruled in *Rosen* v. *United States*, 271 Fed. 651, 656 (C.C.A. 2 1920) that corroboration of accomplice testimony was not absolutely essential to conviction, but, in approving a jury instruction in the *Rosen* case which included the statement that "if, in your judgment, there are no surrounding circumstances tending to corroborate them, you will be justified in rejecting their testimony" the Court referred to the *Holmgren* rule.

It is true also that by the early part of the year 1923 the Second Circuit (again the same bench as in *McGinniss*, *supra*) seems to have gone over all the way to the narrower interpretation of the *Caminetti* case, *viz.* that, unqualifiedly, corroboration of accomplice testimony is not required. *Rachmil* v. *United States*, 288 Fed. 782, 785 (C.C.A. 2 1923).

By the mid-1920's, the unqualified reading of the *Caminetti* language that corroboration is not absolutely required appears to have become the set pattern among the Federal

circuits, and the *Holmgren* rule receded from attention. E.g., *Betz* v. *United States*, 2 F. 2d 552, 554 (C.C.A. 6 1924); *White* v. *United States*, 4 F. 2d 758, 759 (C.C.A. 9 1925).

However, the Eighth Circuit continued its seeming preference for the *Holmgren* rule. *Rossi* v. *United States*, 9 F. 2d 362, 366 (C.C.A. 8 1925); *Lett* v. *United States*, 15 F. 2d 686, 689 (C.C.A. 8 1926). Still, soon after this, in another case, the Eighth Circuit appears also to have switched over to the unqualified version of the *Caminetti* rule. *Wishart* v. *United States*, 29 F. 2d 103, 105 (C.C.A. 8 1928).

Of prime interest, and closer to the contemporary scene, is *Arnold* v. *United States*, 94 F. 2d 499 (C.C.A. 10 1938), where the Court appears to have invoked the test of sufficiency of corroboration of accomplice testimony on the ground that the trial court had not given the jury an adequate instruction along general cautionary lines as to the weight to be given to accomplice testimony. See 94 F. 2d at 501, 506-509. This step by the Tenth Circuit in the *Arnold* case is extremely interesting, we submit, as indicating once again the continuing vitality of the *Holmgren* rule as a matter of justice and fairness at least on a case by case basis. The *Arnold* case was cited with approval, and the seeming principle laid down in the *Arnold* case as above described was apparently approved, in the more recent Tenth Circuit case of *Johns* v. *United States*, 227 F. 2d 374, 375 (C.A. 10 1955). Also citing the *Arnold* case with seeming approval of the point hereinabove described is *People* v. *Dail*, 140 P. 2d 828, 834 (S. Ct. Cal. 1943), where the Court quotes a passage from "*American Jurisprudence*" which is to the same effect as the *Arnold* point. See also the dissenting opinion of Circuit Judge Frank in *United States* v.

Antonelli Fireworks Co., 155 F. 2d 631, 646, fn. 9a (C.C.A. 2 1946).

The chief importance, however, of the above mentioned point in the *Arnold* case as regards the instant Petition for Certiorari, is that the Second Circuit (where the instant proceeding arises) has expressly rejected the *Arnold* point. *United States* v. *Gallo*, 123 F. 2d 229, 230-231 (C.C.A. 2 1941). We therefore submit that thereby a conflict of Circuits arises between the Second and Tenth Circuits, a conflict such that this Court should intercede for the resolution of this important question in the administration of Federal criminal justice.

That the *Holmgren* rule is by no means dead in the doctrinal thinking of Federal judges is further shown by *Smith* v. *United States*, 224 F. 2d 58, 60 (C.A. 5 1955), where the Court referred to " * * * the principle that the testimony of a co-conspirator must be received with caution and should be corroborated, as here, by other evidence", citing *Caminetti* and *Holmgren*. Cf. also *Gormley* v. *United States*, 167 F. 2d 454, 457 (C.C.A. 4 1948), quoting with approval the earlier Fourth Circuit case of *Hoback* v. *United States*, 296 Fed. 5, 8 to the effect that "there is no hard and fast rule requiring the corroboration of an accomplice" in the Federal courts. This language denotes, once again, that there is at least a certain residual doctrinal vitality in the *Holmgren* rule.

Also, notwithstanding the supposed universality of the more recent rule dispensing with the requirement of corroboration of accomplice testimony, there are additional cases indicating that some of the Circuits do occasionally reason in terms of a seeming acceptance of the right of a defendant to insist upon such corroboration. E.g., *Gordon*

v. *United States*, 164 F. 2d 855, 859 (C.C.A. 6 1947), cert. denied 333 U. S. 862; *Stewart* v. *United States*, 131 F. 2d 624 (C.C.A. 5 1942), cert. denied 318 U. S. 779; *Stahley* v. *United States*, 245 F. 2d 427, 433 (C.A. 6 1957).

We note also, incidentally, that in *Barnett* v. *Government of Canal Zone*, 25 F. 2d 459 (C.C.A. 5 1928), the Court applied the Canal Zone statute that a conviction cannot be had on the uncorroborated testimony of an accomplice. Cf. also *Ing* v. *United States*, 278 F. 2d 362, 366 (C.A. 9 1960), and *Christy* v. *United States*, 261 F. 2d 357, 359 (C.A. 9 1958), cert. denied 360 U. S. 919, applying the Alaska Territorial statute requiring corroboration and setting the standards therefor.

It is submitted that the facts of the present case justify a re-examination of the federal accomplice-testimony-corroboration rule and a determination by this Court that the conviction of petitioner Kahaner cannot be supported on the basis of the testimony in this record. The issue is deserving of certiorari.

III. The Standards of Adequate Corroboration as Applied in Jurisdictions Requiring Corroboration of Accomplice Testimony.

1. Corroborating evidence must be inconsistent with innocence. *People* v. *Anthony*, 29 Cal. App. 2d 290, 84 P. 2d 523 (1938). If the corroborative evidence as to the circumstances of the commission of the offense indicates that those circumstances, taken separately or collectively, are consistent with the innocence of the accused, there is no corroboration and conviction thereon will be set aside on

appeal. *People* v. *Woodcock*, 52 Cal. App. 412, 199 P. 565 (1921); *People* v. *Janssen*, 74 Cal. App. 402, 240 P. 799 (1925). The rule of inconsistency with innocence is observed throughout the state jurisdictions. E.g., *State* v. *Ellsberg*, 209 Minn. 167, 295 N. W. 913 (1941); *Thompson* v. *State*, 207 Ark. 680, 182 S. W. 2d 386 (1944); *Sorrell* v. *State*, 249 Ala. 292, 31 So. 2d 82; *State* v. *Clark*, 284 P. 2d 700, 3 Utah 2d 382; *State* v. *Jones*, 95 Mont. 317, 26 P. 2d 341 (1933).

2. Likewise universal is the rule that mere conjecture or suspicion, even "grave suspicion", raised by corroborating evidence, is insufficient. *People* v. *Kempley*, 205 Cal. 441, 271 P. 478 (1928); *People* v. *Davis*, 210 Cal. 540, 293 P. 32 (1930) (grave suspicion); corroboration cannot be accomplished by piling suspicious circumstance upon suspicious circumstance, nor by building up conjecture upon conjecture (*People* v. *Reingold*, 87 Cal. App. 2d 382, 197 P. 2d 175); proof of mere opportunity raises no more than a suspicion of guilt and is insufficient corroboration (*People* v. *Braun*, 31 Cal. App. 2d 593, 88 P. 2d 728 (1939). To similar effect, see *State* v. *Huntington*, 80 N. W. 2d 744 (S. Ct. Iowa 1957); *Sorrell* v. *State*, 249 Ala. 292, 31 So. 2d 82; *Allan* v. *State*, 111 S. E. 2d 70 (S. Ct. Ga. 1960) (grave suspicion insufficient); facts creating grave suspicion are insufficient, indeed facts even though creating a moral conviction of guilt are insufficient if they do not connect the accused with the crime independently of the accomplice testimony (*Jolly* v. *State*, 41 Ga. App. 494, 153 S. E. 432 (1930)); for the purpose of corroborating testimony which is considered too unreliable to take human liberty, something stronger is required than mere suspicion (*Almazan*

v. *State*, 140 Tex. Cr. R. 432, 145 S. W. 2d 576 (1939)); *State* v. *McLaughlin*, 84 N. W. 2d 664 (S. Ct. Minn. 1957) (mere suspicion insufficient); *People* v. *London*, 166 N. Y. S. 2d 597 (Gen. Sess. 1957) (same); *State* v. *Erwin*, 101 Utah 365, 120 P. 2d 285 (1942) (grave suspicion); *State* v. *Gates*, 67 N. W. 2d 579 (S. Ct. Iowa) (mere suspicion); *Hankins* v. *State*, 62 Okla. Cr. 252, 71 P. 2d 119 (1937) (mere suspicion); *State* v. *Reynolds*, 160 Ore. 445, 86 P. 2d 413 (1939) (mere suspicion); proof of mere suspicious circumstances and conjecture together with proof of opportunity to commit the crime charged is insufficient corroboration (*State* v. *Keckonen*, 107 Montana 253, 84 P. 2d 341 (1938)); *Thompson* v. *State*, 207 Ark. 680, 182 S. W. 2d 386 (1944) (mere suspicion).

3. The corroboration must be of a "substantial" character. *Webb* v. *State*, 206 Ark. 640, 176 S. W. 2d 915 (1944); *Stevenson* v. *State*, 50 Okla. Cr. 295, 297 P. 328 (1931); *State* v. *Yeaen*, 86 Mont. 251, 283 P. 210 (1930). It must show "with some cogency" facts authorizing the jury to believe the accomplice. *Odneal* v. *State*, 117 Tex. Cr. R. 97, 34 S. W. 2d 595 (1931). Uncertain or equivocal corroboration is insufficient. *State* v. *Reynolds*, 160 Ore. 445, 86 P. 2d 413 (1939); *Logan* v. *State*, 44 So. 2d 634, cert. denied 44 So. 2d 638 (Ala. App.). The corroborative evidence must satisfy the jury of the truth thereof beyond a reasonable doubt, and the jury must believe beyond a reasonable doubt that it tends to connect the defendant with commission of the crime charged. *Cobb* v. *State*, 20 Ala. App. 3, 100 So. 463 (1924), cert. denied *sub nom. Ex parte State ex rel. Attorney General*, 211 Ala. 320, 100 So. 466; *Powell* v. *State*, 172 Ark. 938, 9 S. W. 2d 583 (1928).

4. The rule seems to be universal throughout the American jurisdictions that in deciding the sufficiency of corroboration of accomplice testimony, the Court must eliminate such testimony and determine whether the other evidence, offered in corroboration, is sufficient to connect the accused with the crime. E.g., *Grady* v. *Commonwealth*, 237 Kentucky 156, 35 S. W. 2d 12 (1931); *People* v. *Leavitt*, 106 Cal. App. 93, 279 P. 1056 (1929); *Davis* v. *State*, 43 Ga. App. 187, 158 S. E. 344 (1931); *Cruz* v. *State*, 40 Ariz. 436, 14 P. 2d 247 (1932); *Chancellor* v. *State*, 23 Ala. App. 504, 127 So. 912 (1930); *State* v. *Paderes*, 187 Minn. 622, 246 N. W. 369 (1933); *State* v. *Smith*, 75 Mont. 22, 241 P. 522 (1926); *State* v. *Todd*, 62 N. D. 479, 244 N. W. 25 (1932); *Hewett* v. *State*, 38 Okla. Cr. 105, 259 P. 144 (1927); *State* v. *Owen*, 119 Ore. 15, 244 P. 516, (1926); *Watkins* v. *State*, 102 Tex. Cr. R. 219, 277 S. W. 397 (1926); *State* v. *Coroles*, 74 Utah 94, 277 P. 203 (1929); *People* v. *Kress*, 284 N. Y. 452, 31 N. E. 2d 898 (1941); *People* v. *Pauley*, 281 App. Div. 223, 119 N. Y. S. 2d 152. In *Lynch* v. *State*, 158 Ga. 261, 123 S. E. 289 (1924), the rule was formulated so as to make it absolutely unmistakable that the corroborative evidence must do more than merely place the accused somewhere vaguely within the overall scene or picture of the alleged offense, and that such evidence must rather actually point rationally to the actual guilt of the accused, the Court saying that to authorize conviction on the testimony of an accomplice, the corroborating circumstances should independently connect the defendant with the offense and raise an inference of guilt independently of the accomplice testimony. The New York Court of Appeals has formulated the rule in words similar to those of the Supreme Court of Georgia in the *Lynch* cases, *supra*. Thus in *People* v. *Cohen*, 223 N. Y. 406,

119 N. E. 886 (1918), re-argument denied 227 N. Y. 623, 125 N. E. 921, the test is stated as being that the corroborative evidence must tend to show not only that a crime has been committed but that the defendant was "implicated" in it. Similar language ("implicated in the commission of the crime") is found in *Livingston* v. *State*, 233 P. 235 (Okla. Cr. App. 1925). Similar also, of course, are the innumerable decisions which speak of the requirement that the corroborative evidence shall tend to connect the defendant with the *commission* of the offense. E.g., *Weaver* v. *State*, 22 Okla. Cr. 414, 211 P. 1062 (1923); *State* v. *Turnbow*, 99 Ore. 270, 193 P. 485 (1920), rehearing denied 99 Ore. 270, 195 P. 569; *Perkins* v. *State*, 20 Ala. App. 113, 101 So. 85 (1924); *Jenkins* v. *State*, 23 Ariz. 485, 205 P. 322 (1922); *Rogers* v. *State*, 136 Ark. 161, 206 S. W. 152 (1918); *People* v. *Rose*, 42 Cal. App. 540, 183 P. 874 (1919); *State* v. *Sonnenscheid*, 37 S. D. 585, 159 N. W. 101 (1916); *Meredith* v. *State*, 85 Tex. Cr. R. 239, 211 S. W. 227 (1919) (there should be "criminative facts proved which tend to connect accused definitely and immediately with the commission of the offense"); *State* v. *Bridwell*, 48 Utah 97, 158 P. 710 (1916). Cf. also *Halbadier* v. *State*, 85 Tex. Cr. R. 593, 214 S. W. 349 (1919) ("matter legally tending to show defendant's guilt"); *Thomas* v. *State*, 89 Tex. Cr. R. 129, 230 S. W. 159 (1921) (the corroboration, "in order to be sufficient, must of itself tend to connect accused in a guilty way with the transaction in question"). Cf. also the cases in which the test is stated in terms of "inculpatory" or "incriminating" corroborative evidence.* It is of interest also that the rule

* E.g., *Lynch* v. *State*, 130 Tex. Cr. R. 110, 124 S. W. 2d 362 (1939); *People* v. *Goldstein*, 303 P. 2d 892 (Cal. App. 1957). There must be evidence, independent of the accomplice's testimony, which would lead reasonable minds to the belief that the defendant criminally participated in the crime charged. *State* v. *Oster*, 370 P. 2d 83 (S. Ct. Ore. 1962).

atively exhaustive attention which the Texas courts have given to the question of the sufficiency of corroborative evidence has included an effort at the defining of the word "tend" (i.e., in connection with the typical statutory language requiring that the corroborative evidence shall tend to connect the defendant with the commission of the offense). Thus, in *Boone* v. *State*, 90 Tex. Cr. R. 374, 235 S. W. 580, 584 (1921) the Court said:

> "In part, the word 'tend' is defined to mean:
>
> 'To serve, contribute or conduce in some degree or way; to have a more or less direct bearing or effect.' Century Dictionary and Webster's Dictionary.
>
> 'It does not contemplate conjecture, but that the testimony shall have a tendency to prove the averments in the indictment.' Words and Phrases, vol. 4, Second Series 874."

See also *Stepp* v. *State*, 92 Tex. Cr. R. 325, 244 S.W. 141 (1922), where the test of the sufficiency of corroboration evidence was stated as being, "does such evidence in and of itself tend to connect the accused with the commission of the offense"; to similar effect, see *Bevil* v. *State*, 93 Tex. Cr. R. 412, 247 S. W. 1024 (1923). See also *Sims* v. *State*, 95 Tex. Cr. R. 164, 253 S. W. 278 (1923), to the effect that the corroborative evidence "must point to the accused with some criminative force as being a guilty party". In other words, "tend" does not mean merely "tendentious". In every single instance the "points of corroboration" adduced by the Government in the instant case are at the very most merely tendentious in their "corroborative" effect concerning the alleged guilt of petitioner Kahaner. We thus see that the familiar language in the corroboration cases

from the various jurisdictions to the effect that the corroborative evidence must tend to connect the defendant with the crime, is not some empty or abstract formula which allows conviction upon merely any vague or tenuous "connecting" evidence. The cases make it clear that this "connection" must be sufficient to "raise an inference of guilt independently of the accomplice testimony". We submit that this is the sensible meaning of the rule as to sufficiency of corroborative evidence. Tested by the rule in this sensible form, is it not manifest that the supposed "points of corroboration" mentioned by the Government in its Brief in Opposition herein do not satisfy, in a single instance, the test of sufficiency of "corroborative" evidence?

5. The Courts have declared many times that where several defendants are on trial, there must be corroboration as to each defendant to sustain a conviction on the testimony of accomplices. E.g., *People* v. *Mullens*, 292 N. Y. 408, 55 N. E. 2d 479 (1944), motion denied 293 N. Y. 768; *Luna* v. *State*, 62 Okla. Cr. 435, 71 P. 2d 1101 (1937); *State* v. *Baish*, 32 Wyoming 136, 230 P. 678 (1924). Unauthorized acts of third parties may not be used as "corroboration" to connect a defendant with commission of the crime charged. *People* v. *Kress*, 284 N. Y. 452, 31 N.E. 2d 898 (1941). These principles are but an expression of the equally fundamental idea that "corroborated" "associative" imputations or emanations of alleged guilt through presence of the accused in the company of accomplices, or at the scene of the crime, etc., or other insinuations of "opportunity" to commit the crime, are insufficient. Thus:—Evidence which only shows opportunity to commit the offense is insufficient corroboration (*Roberd* v. *State*, 276 S. W.

2d 270 (Texas Cr. App.); *State* v. *Keckonen*, 107 Mont. 253, 84 P. 2d 341 (1938); *People* v. *Thurmond*, 338 P. 2d 472 (Cal. App. 1959); *State* v. *Brake*, 99 Ore. 310, 195 P. 583 (1921). And, more specifically, presence at or near the scene of the offense is insufficient. *Sheltman* v. *State*, 152 Tex. Cr. R. 139, 210 S. W. 2d 822; *People* v. *Wood*, 13 Cal. Rptr. 339 (Cal. App. 1961). Similarly, the mere existence of intimate personal relations between alleged co-conspirators is not sufficient to corroborate the evidence of an accomplice. *People* v. *Doyle*, 107 Misc. 268, 177 N. Y. S. 641 (N. Y. Gen. Sess. 1919). Mere acquaintance and relation of the defendant with a person who stole furs, both before and after the theft, was held insufficient to corroborate accomplice testimony and to connect the defendant with the offense. *State* v. *Paulen*, 210 Iowa 192, 230 N. W. 555 (1930). Corroborative testimony that defendant had left his residence on the night of the arsonous fire with the accomplices and had returned with them was held insufficient. Testimony that defendant was with the accomplice early in the evening on the night of a breaking and entering and that he slept that night at the home of the accomplice, whose conviction was sufficiently sustained by the evidence, was insufficient corroboration of the accomplice testimony. *Luster* v. *Commonwealth*, 333 S. W. 2d 267 (S. Ct. Ky., 1960). It was also held insufficient corroboration that the defendant was seen with accomplices before the commission of the offense and shortly thereafter in the vicinity to which the accomplices testified that the stolen property had been carried to be sold. *Smith* v. *State*, 140 Tex. Cr. R. 283, 144 S. W. 2d 542 (1940). In a bribery prosecution, evidence of the presence of the defendants with an accomplice near the place where on a certain date

the accomplice in private handed a sum of money to one of the defendants was insufficient corroboration of the accomplice's assertion that he transferred the money to one of the defendants. *People* v. *Mullens*, 292 N. Y. 408, 55 N. E. 2d 479 (1944), motion denied 293 N. Y. 768, 57 N. E. 2d 845. In order for the intimate association of the accused with an accomplice to be corroborative of accomplice testimony it must be an association accompanied by circumstances which lead to an inference of connection with the crime itself, it being insufficient merely to show connection with the perpetrators of the crime. *State* v. *Reynolds*, 160 Ore. 445, 86 P. 2d 413 (1939). This conclusion was reached in the *Reynold's* case despite the fact also that it was proved that the accused had a memorandum containing the names of the accomplices, the Court stating that this was not a circumstance from which could be inferred association with the accomplices or connection with their crime so as to satisfy the test of corroboration. As it was well put in a New York case, the corroborative evidence must tend to connect the defendant with the crime, not with the accomplice. *People* v. *Lashkowitz*, 257 App. Div. 518, 13 N. Y. S. 2d 663, re-argument denied 258 App. Div. 828, 16 N. Y. S. 2d 525. We particularly call attention also to the decision of the Supreme Court of Minnesota in *State* v. *Starr*, 81 N. W. 2d 94 (1957), a burglary prosecution, where there was nothing except the accomplice testimony linking the accused to the crime, and the accused's explanation of his presence at a certain restaurant with a third party who admitted participation in the burglary with the accomplice was as consistent with the accused's innocence as with guilt, the Court holding that the evidence was insufficient to corroborate the testimony of the accom-

plice. We emphasize this and the similar foregoing cases because of the importance attached by both Courts below, and by the Government, to petitioner Kahaner's presence at certain meetings, as to which Kahaner offered innocent explanations. Additional cases illustrating the insufficiency of corroborative evidence based on the mere association of the accused with the perpetrators of the crime, or upon his presence at or proximity to the scene of the alleged offense, are, e.g., *Kemp* v. *State*, 24 Ala. App. 591, 139 So. 437 (1932); *Sanders* v. *State*, 46 Ga. App. 175, 167 S. E. 207 (1933); *Cornett* v. *State*, 42 Okla. Cr. 93, 274 P. 676 (1929); *O'Quinn* v. *State*, 43 Okla. Cr. 372, 279 P. 358 (1929); *Holmes* v. *State*, 52 Okla. Cr. 406, 5 P. 2d 770 (1932); *Odneal* v. *State*, 117 Tex. Cr. R. 97, 34 S. W. 2d 595 (1931) (a bribery prosecution in which defendant and the accomplice were together shortly before the alleged conspiracy to bribe the witness); *Livingston* v. *State*, 233 P. 235 (Okla. Cr. App. 1925); *Nunnally* v. *State*, 90 Tex. Cr. R. 233 (1921); *Johnson* v. *State*, 84 Tex. Cr. R. 400, 208 S. W. 170 (1919); *McClure* v. *State*, 89 Tex. Cr. R. 407, 231 S. W. 774 (1921); *Pate* v. *State*, 91 Tex. Cr. R. 471, 239 S. W. 967 (1922); *State* v. *Oster*, 376 P. 2d 83 (S. Ct. Ore. 1962); *People* v. *Kress*, 284 N. Y. 452, 31 N. E. 2d 898 (1941); *State* v. *Quinn*, 69 S. D. 574, 13 N. W. 2d 50 (1944); *People* v. *Braun*, 31 Cal. App. 2d 593, 88 P. 2d 728 (1939).

6. Several State Courts have laid down the requirement that the corroboration extend to one or even all of the actual elements of the offense charged—in our case the critical element being the alleged payment of money. Thus, the Kentucky Supreme Court has held that corroboration of the accomplice testimony, to warrant conviction, must extend to every fact necessary to establish that the offense charged

was perpetrated by the accused. *Means* v. *Commonwealth*, 238 Kentucky 266, 38 S. W. 2d 193 (1931); *Newby* v. *Commonwealth*, 255 Kentucky, 597, 75 S. W. 2d 25 (1934); *Spriggs* v. *Commonwealth*, 200 Kentucky 559, 255 S. W. 408 (1923). The California Court has ruled that the corroboration must relate to some act or fact which is an element of the crime. *People* v. *Lyons*, 324 P. 2d 556 (S. Ct. Cal. 1959); *People* v. *Means*, 3 Cal. Rptr. 597 (Cal. App. 1960). The Texas Court of Criminal Appeals has declared that where an accomplice's testimony is corroborated in only one essential fact, a conviction cannot be sustained since every essential fact testified to by the accomplice alone must be corroborated by non-accomplice testimony tending to connect the accused with the commission of the offense charged. *Almazan* v. *State*, 140 Tex. Cr. R. 432, 145 S. W. 2d 576 (1941). The Maryland, Iowa and Colorado rule is that the accomplice must be supported in at least some material point tending to show the guilt of the accused or the identity of accused with the perpetrators of the crime or with participation in its commission. *Lomp* v. *State*, 191 A. 2d 224 (S. Ct. Md. 1963); *State* v. *Geier*, 87 N. W. 2d 318 (S. Ct. Iowa 1958); *Miller* v. *People*, 92 Colo. 481, 22 P. 2d 626 (1933). Cognate with this is the fundamental rule earlier mentioned that what is needed in corroboratory testimony is that the defendant be connected with the commission of the offense charged, not merely that the offense was committed, nor of trivialities or immaterial matters. E.g., *State* v. *Pray*, 65 S. D. 1, 270 N. W. 542 (1937). As seen, there must be evidence from an independent source as to some material fact tending to show not only that the crime has been committed but that the defendant was implicated in its commission. *People* v. *Mullens*, 292 N. Y. 408, 55 N. E. 2d 479 (1944), motion denied 293 N. Y. 768. Proof merely as

to the *corpus delicti*, i.e., commission of the offense or the circumstances thereof, is insufficient. *Mitchell* v. *State*, 28 Ala. App. 119, 180 So. 119 (1938), cert. denied 235 Ala. 530, 180 So. 123; *Newman* v. *State*, 63 Ga. App. 417, 11 S. E. 2d 248 (1940); *State* v. *Keckonen*, 107 Mont. 253, 84 P. 2d 341 (1938); *People* v. *Maione*, 284 N. Y. 423, 31 N. E. 2d 759 (1941), aff. 287 N. Y. 737, 39 N. E. 2d 940; *Hufford* v. *State*, 61 Okla. Cr. 141, 66 P. 2d 529 (1937); *Duarte* v. *State*, 48 Ariz. 356, 61 P. 2d 1015 (1936). Especially significant is the Texas case of *Reed* v. *State*, 118 Tex. Cr. R. 307, 40 S. W. 2d 97 (1931), holding that a conviction for possession of liquor could not be sustained unless the accomplice's testimony as to the *corpus delicti* was corroborated, and unless there was other testimony connecting the defendant with the commission of the offense. It is to be remembered that the *corpus delicti* in the instant case is the alleged payment of money to Kahaner and Keogh, and that there is no testimony whatever except from the accomplice witnesses to establish such alleged *corpus delicti*.

7. Applying the foregoing principles are the following illustrative cases which we have selected for a little more detailed description because their facts seem to us of special interest for our situation or for the evaluation of the Government's claimed "points of corroboration" herein:—In *People* v. *Sloan*, 17[illegible] al. 2d 778, 112 P. 2d 241 (1941), a prosecution of a mayor's secretary and another person for aiding, abetting and compelling the City's Civil Service Department manager and others to alter and falsify examination grade records, evidence offered to corroborate accomplices was held insufficient, among the insufficient items being: (1) The testimony of a non-accomplice retired fire department battalion chief as to his agreement with the

defendant's secretary to place men friendly to the Mayor's administration in the Fire Department's civil service positions; (2) testimony by a non-accomplice police officer that another person had told him that there was a preferred list of officers friendly to the Mayor's administration, that the defendant's secretary had agreed with said person's statement and had stated that friends of the administration would be taken care of, and that the person referred to had said he might be able to help the witness in the examination for position of sergeant; (3) testimony by another non-accomplice witness that he had received a list of numbers and police officers' names from one who had told the witness which numbers represented true or false answers to the examination questions, and that the witness gave the list to various police officers and received contributions for the Mayor's election campaign from some of them; (4) testimony by a non-accomplice acting police captain that the defendant's secretary had asked him how he would like to be a police captain, whether he favored the Mayor's administration, how he would like to be placed on the list of eligibles for captaincy; (5) testimony by a non-accomplice fire department employee that he had asked the defendant's secretary whether he could do anything to keep from being moved back on the list for battalion chief examination, that the defendant's secretary had said that the witness appeared to be one who would return a favor, and that the witness contributed to the Mayor's election campaign fund after publication of the eligible list with the witness in second place, and the witness was subsequently appointed to the position. In *Goodin* v. *Commonwealth*, 256 Kentucky 1, 75 S. W. 2d 567 (1934), an arson prosecution, none of the following evidence offered to corroborate the accomplice

testimony that the defendant had employed them to commit the crime was held sufficient: (1) That the defendant refused to swear out warrants against the confessed arsonists for taking the defendant's furniture from the house before burning it; (2) that he employed an attorney to attend their examining trial and procured a copy of the stenographer's notes at the Fire Marshal's investigation; (3) that the defendant had taken out substantial insurance on the burned house and the personalties therein; (4) that the defendant had allowed or required his tenant, who was behind in the rent, to move from the house two or three weeks before it was burned; (5) that the former tenant testified that one of the two confessed arsonists had asked her for rent, in which she was behind, when she moved out of the house that was subsequently burned; (6) that a mortgage had been signed by one of the confessed arsonists and witnessed by the defendant, the arsonist having testified that the defendant loaned her money for the first payment on the automobile used in hauling kerosene to the burned house; (7) that the defendant had given one of the confessed arsonists keys to the burned house and money for plaster to repair the breaks, the arsonists having testified that the defendant had employed them to burn the house and that the object of the repairs was to prevent suspicion during their arrangement to do so; (8) that the defendant had been heard to say that he did not enter the burned house after the fire because he was afraid that he might take hold of something which would show his fingerprints; (8) that one of the confessed arsonists was at the home in which the defendant roomed about noon on the morning after the fire. In *Wilson* v. *State*, 190 Ark. 651, 80 S. W. 2d 925 (1935), a prosecution for arson, evidence by the owner of a gin that the accused

had told him after the burning of the gin that he had brought the alleged accomplice out to the gin with prospective buyers to give his opinion on the gin machinery which the accused was selling for the owner's debt thereon, and evidence by the buyers that they barely knew the accomplice and did not want his opinion, was held insufficient corroboration of the accomplice testimony. Another illustration of the strictness with which the requirements as to corroborative evidence are applied is *People* v. *Dinenza*, 356 Ill. 118, 190 N. E. 298 (1934), a prosecution for attempted extortion, where the Supreme Court of Illinois held insufficient evidence that the defendant had written two or three letters at the alleged accomplice's home (the letters not being shown to have been the threatening letters allegedly delivered by the accomplice), notwithstanding further evidence that, when writing the letters, the defendant had asked the corroborating witness whether the intended victim had any money. Another instance of the strict application of the rule requiring corroboration is *State* v. *Sanderfur*, 82 N. W. 2d 623 (S. Ct. Minn. 1957), a burglary prosecution, where evidence that the defendant had, after his arrest, given a cell-mate a copy of a statement which defendant had given to the police and that defendant had directed the cell-mate to give a copy to the alleged accomplice with directions to "read it and stick to it", plus evidence that pliers which had disappeared from the burglary premises were subsequently found in an automobile driven by defendant, was held insufficient corroboration of the accomplice testimony. Another illustration is *People* v. *D'Allesandro*, 329 P. 2d 616 (Cal. App. 1959) holding that in a prosecution to defraud an insuror in regard to the destruction of a truck and conspiracy to do so, testimony of

the wife of an admitted accomplice to the effect that the defendant in two telephone calls had asked her whether the accomplice had talked, and that defendant had stated to her that the accomplice should not involve others, was insufficient corroboration. An interesting recent instance of the strictness of the rule requiring corroboration of accomplice testimony is *Froman* v. *State*, 339 S. W. 2d 601 (S. Ct. Ark. 1961), a prosecution for robbery, where the testimony of the victim's wife concerning the denomination of money taken in a robbery coincided with the testimony of the accomplice as to the denomination of money allegedly divided by the defendants in the accomplice's apartment after the robbery, and this was held insufficient as corroboration. We also call particular attention to the New York case of *People* v. *Lashkowitz*, 257 App. Div. 518, 13 N. Y. S. 2d 663 (1939), re-argument denied 258 App. Div. 828, 16 N. Y. S. 2d 525, a trial for arson, where the following was held insufficient corroboration: (1) Testimony that a non-accomplice witness saw the defendant give a key to the accomplice and that said accomplice told the witness that the key used in trying to open the door of the burned building was one received from defendant while they were returning home on the morning after the fire; (2) testimony of the accomplice's chauffeur that his employer requested payment of a stated sum by the defendant and that the defendant answered that the accomplice had made enough money during the alcohol period and would not be given any by the defendant. In a prosecution of a member of a County Board of Supervisors for obtaining money from the County by aiding and abetting the accomplice to obtain warrants by false pretenses, the fact that the defendant recommended payment of the claims was not sufficient corroboration of

the accomplice's testimony, nor was testimony that the accomplice had bought an automobile for the defendant. *State* v. *Hild*, 39 N. W. 2d 139 (S. Ct. Iowa). In a prosecution of a former commissioner of highways for falsely auditing or paying claims, the fact that the contracting company had a large portion of emergency contracts which had been let without advertisement for competitive bids, and that the company was apparently a favorite contractor, on friendly terms and a frequent caller at the highway department, did not corroborate the accomplice testimony. *State* v. *Ellsbera*, 209 Minn. 167, 295 N. W. 913 (1941). In *State* v. *Odle*, 45 S. D. 575, 189 N. W. 515 (1922), it was held that the fact that a person charged with conspiring to steal horses was with the thieves at the owner's place where he saw the horses and expressed the belief that they could be easily stolen, was a circumstance tending to connect him with the larceny if unexplained, but was insufficient to corroborate the accomplice testimony as to his having told them to take the horses where it was shown that he was at the place in another person's employment and was performing the duty for which he was employed at the time, so that such circumstance was as consistent with innocence as with guilt.

It has been frequently stated that, in the last analysis, the sufficiency of corroboration must be determined by the facts in each case. *Willman* v. *State*, 99 Tex. Cr. R. 259, 268 S. W. 933 (1925), second re-hearing denied 99 Tex. Cr. R. 259, 269 S. W. 801; *State* v. *Brake*, 99 Ore. 310, 195 P. 583 (1921); *Powell* v. *State*, 177 Ark. 938, 9 S. W. 2d 583 (1928); *State* v. *Cotton*, 240 Iowa 609, 33 N. W. 2d 880; *Bird* v. *State*, 85 Okla. Crim. 313, 188 P. 2d 242. And it has

been specifically held that in a conspiracy prosecution, proof of the existence of the underlying agreement and the connection of the defendant therewith may be of such a single and inseparable nature as to require corroboration of both of these elements, *People* v. *Griffin*, 219 P. 2d 519 (Cal. App.). In any event, our case, if the corroboration rule should be applied, would require corroboration of the alleged passing of money. Nothing in the Government's "points of corroboration" would meet the tests laid down in the cases above reviewed.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

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